plant "the seeds of Section 271 success."[10] Alternatively, it might propose an approach suggested by FCC Commissioner Michael K. Powell in his separate statement in the FCC's decision to reject Bell South's petition for 271 authority in South Carolina, in which UNEs would be recombined voluntarily by ILECs for what Commissioner Powell labelled a modest "glue charge."[11] In this way, UNEs could be provided by Bell Atlantic in a way that contributes to efficiency, an important goal of economic regulation, and therefore to the further development of local exchange competition -- while avoiding a potentially fatal defect in Bell Atlantic's compliance with the Act's Section 251 interconnection requirements and the Section 271 checklist. Compliance with the Act's Section 251 interconnection and Section 271 "checklist" requirements is the linchpin for further progress toward and final achievement of open and more competitive markets for both local and long-distance service. Success in meeting those requirements is an important goal for this Department. Otherwise, local exchange competition in Massachusetts and Bell Atlantic's prospects for receiving interLATA authority will both be harmed, to the ultimate detriment of Massachusetts consumers.[12]

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[10] FCC South Carolina Order, Separate Statement of Commissioner Michael K. Powell, p. 1.

[11] Id. at 2. The Department recognizes that the level at which such a charge might properly be set could be a subject of debate and offer yet another opportunity to obstruct our goal of increased intraLATA and interLATA competition.

[12] To date, the record of the Bell Operating Companies ("BOCs") in satisfying the FCC's Section 271 requirement is disappointing as evidenced by failure any BOC to obtain FCC approval. The goal of this Department with respect to Bell Atlantic's

(continued...)

In light of our conclusions above, the Department orders the parties to return to negotiations on the issue of UNE provisioning. The parties are to report to the Department on the status of those negotiations two weeks from the date of this Order. If the parties are unsuccessful in reaching agreements regarding UNE provisioning, the Department will proceed to arbitration on this issue.

III. THE NEGOTIATION AND CONTRACTUAL ISSUES

We now address the negotiation and contractual issues raised by the parties in this proceeding.

A. Positions of the Parties

AT&T and MCI argue that, in the months leading up to the Eighth Circuit Decision, Bell Atlantic had agreed, during the negotiations of interconnection agreements, to provide combinations of UNEs. They claim that Bell Atlantic is now reneging on those commitments, and they argue, as a matter of contract law and under the terms of the Act, that Bell Atlantic should have to stand by the earlier agreements. AT&T, for example, notes that because Bell Atlantic and AT&T had reached a negotiated agreement that Bell Atlantic was to provide UNE combinations, AT&T's petition for arbitration did not list this issue as "unresolved" and thus subject to arbitration. AT&T asserts that Bell Atlantic's attempt to

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[12](...continued)

Section 271 filing is to succeed in implementing the Act's interconnection and Section 271 requirements by doing it once and doing it right. Sound treatment of the UNE issue will advance us toward that goal. In the larger scheme, this goal is far more important than protracted skirmishing over the UNE issue. This strategic objective should not be jeopardized for mere tactical gain.

reopen issues settled during the negotiation stage of the process and not identified as issues open for arbitration would render meaningless the Act's requirement that parties identify issues open for arbitration. It cites similar cases and orders by the Ohio and Texas public utilities commissions in support of its conclusions (AT&T Initial Brief at 27-29).

Likewise, MCI asserts that the course of conduct of Bell Atlantic and MCI during their negotiations established that agreement had been reached on the issue of UNE combinations. It argues that Bell Atlantic should not be permitted to create a disputed issue where none existed earlier. MCI argues that the Department should enforce the contractual obligation it asserts has been created during the negotiation process (MCI Initial Brief at 4-9).

In reply, Bell Atlantic asserts that its earlier agreement to provide UNE combinations was not voluntary but was imposed upon it by the FCC's interpretation of the Act, an interpretation since found to be in error by the Eighth Circuit. It argues, therefore, that it should not be bound by those agreements, and that, in any event, it has made clear during this proceeding that it was reserving its rights to revisit issues based on later judicial determinations (Bell Atlantic Reply Brief at 2, 11). It further points out that the negotiated agreements contain a provision stating, in essence, that the terms would be subject to renegotiation if regulatory changes occurred that made those terms obsolete (id. at 11). Bell Atlantic also argues that it has no contract with AT&T, Sprint, or MCI, and where there is no contract with a party, there is no merit to a contractual claim (id. at 2).

B. Analysis and Findings

Each of the interconnection agreements for the parties in this consolidated proceeding is at a different stage: the Brooks Fiber agreement is completed and signed, and has been approved by the Department (see D.T.E. 97-70 (1997)); the arbitration sessions and Department's orders for the AT&T agreement are completed, but the agreement has not been signed; the arbitration sessions and Department orders for the Sprint agreement are completed, and we understand that Sprint was awaiting the specific language of the AT&T agreement to serve as a model for its agreement; the MCI arbitration sessions have been completed by the arbitrator, but his awards remain subject to the Department's review of exceptions submitted by the parties; and the arbitration sessions and Department orders for the TCG agreement are completed, and the agreement is under Department review.

We recognize that, had the Eighth Circuit Decision been issued before the start of negotiations, Bell Atlantic might have refused, at that time, to offer UNE combinations to the CLECs, even though it would have been technically feasible to offer them. We can surmise that this issue would then have been added to the list of disputed items that would be subject to arbitration. On the other hand, Bell Atlantic might have volunteered to offer UNE combinations during such a negotiation, trading that provision in the variety of "gives" and "takes" that are inherent in any such negotiation. These and other possibilities, however, are speculative and do not help to inform our decision on this issue.

The Act creates an obligation on parties to an interconnection negotiation to indicate to the Department which issues are unresolved in that negotiation and are therefore subject to

arbitration. 47 U.S.C. § 252(b)(2)(A). While the Department has attempted to be flexible in the early months of the arbitrations with regard to the deadlines provided by the Act, the Department has been guided by these deadlines in anticipation of achieving the Act's intention of producing interconnection agreements in a brief period of time so that the benefits of competition envisioned in the Act could reach the consumers of Massachusetts. Although several issues remain to be litigated in this consolidated arbitration proceeding, all of those issues were identified in the initial petitions or were natural extensions of those issues as the arbitration proceeding has evolved. Thus, for example, the CLECs and Bell Atlantic disagreed on whether Bell Atlantic should provide dark fiber as a UNE; Bell Atlantic was ordered to do so; and, as a natural extension of that decision, the pricing methodology for that UNE is now being litigated. In those instances in which issues were stated as unresolved in the petitions, and where the parties recognized that the arbitration was likely to take an extended period of time (e.g., pricing and performance standards), "placeholders" in the interconnection agreement were inserted.

We first address the AT&T interconnection agreement. We assume, for purposes of this analysis, that an agreement is completed, in that all disputed provisions have been arbitrated and an order issued by the Department. AT&T/NYNEX Arbitration, D.P.U. 96-80/81 (August 29, 1997). As Bell Atlantic has noted, a generic provision was included in the approved language of this agreement which states, "[I]n the event that as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that [Bell Atlantic] shall not be required to furnish

any service or item or provide any benefit required to be furnished or provided to AT&T hereunder, then AT&T and [Bell Atlantic] shall promptly commence and conduct negotiations in good faith with a view toward agreeing to mutually acceptable new terms..." (Bell Atlantic Reply Brief at 11-12). As we have found above, the Eighth Circuit Decision is a clear example of such a decision. We conclude, therefore, that AT&T has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

We next address the Sprint interconnection agreement. As in the case of the AT&T agreement, the Department has completed its review of disputed items. Sprint/NYNEX Arbitration, D.P.U. 96-94 (January 15, 1997). Our understanding, based on correspondence from Sprint, is that it was awaiting the final version of the AT&T agreement as a model.[13] Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to Sprint. Sprint has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

We next address the MCI agreement. As we have noted above, the parties have filed exceptions to the arbitrator's awards with the Department. Nonetheless, the draft agreement has provisions which are similar to those of the AT&T agreement. Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to MCI.

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[13] "Sprint wants to ensure that it is offered comparable terms and conditions as those granted to other competitors, such as AT&T. Therefore, Sprint respectfully requests an extension of time, until two weeks after AT&T files its interconnection agreement, to file its interconnection agreement with the Department." Letter from Cathy Thurston, Attorney for Sprint, to Mary Cottrell, Secretary to the Department, January 14, 1998.

MCI has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

Brooks Fiber and TCG have not offered comments on this issue of UNE combinations. To the extent their agreements provide for renegotiation in the face of changes to statutory interpretations or regulatory changes, they, too, have the right to pursue renegotiations with Bell Atlantic.

IV. ORDER

After due consideration, it is

ORDERED: That Bell Atlantic, AT&T, Brooks Fiber, MCI, Sprint, and TCG return to negotiations on the issue of UNE combinations, and report to the Department on the status of those negotiations two weeks from the date of this Order; and it is

FURTHER ORDERED: That Bell Atlantic and its competitors, AT&T, Brooks Fiber, MCI, Sprint, and TCG, complete, and file for Department review, interconnection agreements consistent with the Act and the terms of this Order.

By Order of the Department,

Janet Gail Besser, Chair

John D. Patrone, Commissioner

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

A true copy
Attest:
MARY L. COTTRELL
Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application and complaint of **MCIMETRO ACCESS TRANSMISSION SERVICES, INC.**, against **AMERITECH MICHIGAN** requesting non-discriminatory, efficient and reasonable use of unbundled loops using GR303 capability.	)))))	Case No. U-11583

At the June 3, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On November 6, 1997, MCImetro Access Transmission Services, Inc., (MCI) filed an application and complaint (complaint) against Ameritech Michigan pursuant to the provisions of 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the MTA) requesting non-discriminatory, efficient, and reasonable use of unbundled loops using Bellcore's General Requirements-303 (GR303) capability.[1]

[1]According to MCI, GR303 capable equipment will permit the connection of unbundled loops terminating in Ameritech Michigan's end offices to MCI's switching equipment in a manner that

On December 11, 1997, Ameritech Michigan filed an answer and affirmative defenses to the complaint.

On December 15, 1997, Administrative Law Judge Theodora M. Mace (ALJ) conducted a prehearing conference that was attended by MCI and Ameritech Michigan.

On February 6, 1998, the ALJ conducted an evidentiary hearing. Two witnesses testified and 16 exhibits were received into evidence. Thereafter, MCI and Ameritech Michigan both submitted briefs and reply briefs to the ALJ.

On April 10, 1998, the ALJ issued a Proposal for Decision (PFD) in which she recommended that the Commission grant the relief sought by MCI in its complaint.

On April 27, 1998, Ameritech Michigan filed its exceptions to the PFD. On May 8, 1998, MCI filed replies to exceptions.

II.

BACKGROUND INFORMATION

In orders issued on December 20, 1996 and June 5 and July 31, 1997 in Case No. U-11168,[2] the Commission approved an interconnection agreement between Ameritech Michigan and MCI. Among other things, the interconnection agreement provided that either party could make a bona fide request pursuant to Article 2.2 and Schedule 2.2 for certain services, including features, capabilities, functionalities, network elements, or combinations that were not otherwise specified in the interconnection agreement.

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eliminates the need for costly collocated facilities and reduces transport costs.

[2]Commissioner Shea dissented from these orders.

On July 18, 1997, MCI sent an eight-page facsimile transmission to Ameritech Michigan entitled "MCI Bona Fide Request For Switched Combination Of Unbundled Elements." Specifically, MCI stated that it would like to establish a process to lease GR303 capable remote digital terminals from Ameritech Michigan. According to MCI's proposal, GR303 capable remote digital terminals would be located in an undetermined number of Ameritech Michigan's central offices. MCI desires to have Ameritech Michigan place this equipment, specifically SLC 2000 or equivalent equipment[3], in Ameritech Michigan's central offices to function as digital loop carriers to facilitate MCI's service to the local telecommunications marketplace. It is MCI's plan to have unbundled loops connected to the GR303 compatible equipment to take advantage of the capability of such equipment to concentrate traffic.[4] By so doing, MCI expects to realize significant savings by leasing considerably fewer circuits of transport between Ameritech Michigan's central offices and MCI's switches and by avoiding the additional costs associated with collocation.

On July 23, 1997, Ameritech Michigan informed MCI that further clarification of the bona fide request was necessary before an appropriate response could be prepared. Although acknowledging that MCI's request appeared to be technically feasible for the provision of at least some, if not all, of the GR303 capabilities, Ameritech Michigan indicated that it did not have

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[3]The SLC 2000 is manufactured by Lucent Technologies. Ameritech Michigan does not currently utilize Lucent SLC 2000 equipment in its network. Rather, Ameritech Michigan currently deploys Litespan 2000 equipment, which is manufactured by DSC Communications.

[4]GR303 capable digital loop carriers are able to concentrate unbundled loops for transport in accordance with varying ratios that can be established based on customer usage and calling patterns. For example, if set at a 6:1 ratio, the concentration capability would make it possible for 6 unbundled loops to function through use of only 1 DS-0 circuit of transport instead of 6 such circuits.

sufficient information to determine if such equipment would meet MCI's specific service requirements or to determine a price for the equipment. Accordingly, Ameritech Michigan requested that MCI provide answers to six specific questions.

On August 18, 1997, MCI sent its response to Ameritech Michigan's July 23, 1997 message. MCI's response contained the six answers requested by Ameritech Michigan and included a diagram of the proposed network configuration for the GR303 capable equipment.

On August 21, 1997, Ameritech Michigan responded to MCI's August 18, 1997 message. In so doing, Ameritech Michigan stated that uncertainties still existed regarding the intent of MCI's bona fide request. Specifically, Ameritech Michigan asked MCI to confirm whether MCI's request was for Ameritech Michigan to place non-standard equipment in Ameritech Michigan's central offices and to have Ameritech Michigan connect such equipment on MCI's behalf to both unbundled loops and unbundled dedicated transport at an unspecified concentration level.

Before MCI could respond to Ameritech Michigan's August 21, 1997 message, Ameritech Michigan sent a follow-up letter dated September 5, 1997 indicating that Ameritech Michigan would not process MCI's bona fide request. Citing the interconnection agreement between the companies, the Federal Communications Commission's (FCC) administrative rules that were adopted pursuant to the FCC's First Report and Order,[5] the recent decision of the Eighth Circuit Court of Appeals in Iowa Utilities Board v FCC. 120 F3d 753 (CA 8, 1997), cert gtd _____

[5]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. CC Docket No. 96-98 (August 8, 1996).

US _____ (1998), and the federal Telecommunications Act of 1996 (the FTA),[6] Ameritech Michigan insisted that it was not required to provide MCI with access to GR303 compatible equipment because such equipment was not currently installed in Ameritech Michigan's network. Ameritech Michigan also stressed that because it does not currently combine the loop and transport elements in the manner requested by MCI, it would be MCI's responsibility to combine these elements.

III.

POSITIONS OF THE PARTIES

MCI

Christopher Gushue, a contract specialist employed by MCI, testified that, in order for MCI to operate as a facilities-based, competitive provider of basic local exchange service to residential and small business customers in Michigan, it is necessary for MCI to connect unbundled loops leased from Ameritech Michigan to MCI's network. Mr. Gushue stated that one way of accomplishing that task would be for MCI to collocate facilities at every Ameritech Michigan end-office where MCI leases unbundled loops.[7] However, Mr. Gushue stated that collocation can be extremely expensive and time consuming to implement. Given these considerations, he did not believe that collocation was an efficient or cost-effective means of connecting unbundled

[6]Public Law No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code).

[7]This scenario would require Ameritech Michigan to cross connect the unbundled loops to MCI's collocation cage, with MCI performing all necessary functions within the cage, including concentration, and then leasing transport circuits from the collocation cage to MCI's network.

loops to MCI's network. Moreover, he explained that there is no technical reason for MCI to use collocation in order to connect unbundled loops to its network.

Mr. Gushue testified that the requested network capability in MCI's bona fide request would permit connecting unbundled loops to MCI's network without having to collocate any facilities at Ameritech Michigan's end-offices. According to Mr. Gushue, MCI would lease unbundled loops from Ameritech Michigan that would be connected to the GR303 capable equipment for concentration. In turn, MCI would lease dedicated transport between the GR303 capable equipment and its own network. Mr. Gushue maintained that, from a network perspective, use of GR303 capability as requested by MCI in the bona fide request would make connection of unbundled loops to MCI's network very efficient because it would eliminate the need for collocation and would maximize the use of transport, thereby minimizing the cost of transporting the loops to MCI's network. Further, he insisted that other forms of connection of the loops, such as physical or virtual collocation, would be inferior and less efficient.

Mr. Gushue also testified that the configuration outlined in the bona fide request is technically feasible and would utilize the same type of equipment that Ameritech Michigan already deploys in its network. Mr. Gushue explained that Ameritech Michigan currently uses Litespan 2000 technology in its loop network as part of its digital loop carrier system. He stated that Litespan 2000 technology has the capability of using the GR303 protocol to perform the concentration function needed by MCI. Indeed, Mr. Gushue maintained that the only real difference between the GR303 capability that MCI requested and the system currently utilized by Ameritech Michigan is the physical placement of the Litespan 2000 equipment. He indicated

that Ameritech Michigan places the GR303 capable equipment in the field whereas MCI wants the equipment located in Ameritech Michigan's end-offices.

Finally, Mr. Gushue contended that Ameritech Michigan would not need to alter its existing network in order to accommodate MCI's bona fide request. He stated that MCI's request would not obligate Ameritech Michigan to make changes to any of its switches, digital loop carrier equipment, or outside plant environment. While conceding that Ameritech Michigan may need to develop certain new mechanical or electronic processing and administrative systems for the provision of the equipment requested by MCI, Mr. Gushue maintained that any administrative burdens encountered by Ameritech Michigan would be relatively insignificant. He noted that Ameritech Illinois had installed GR303 capable equipment for one end-user.

Ameritech Michigan

Scott J. Alexander, Ameritech Michigan's Senior Project Manager for Product Policy and Planning, described MCI's bona fide request as nonstandard and deficient. However, he conceded that these shortcomings were not critical to the formulation of Ameritech Michigan's response. Rather, he stressed that Ameritech Michigan denied the bona fide request primarily because Ameritech Michigan's network does not currently use digital loop carrier systems that support the GR303 protocol and because his company has no plans to deploy such equipment.

Mr. Alexander insisted that the bona fide request would require Ameritech Michigan to combine network elements (unbundled loops and unbundled interoffice transport) for MCI using equipment that is not currently used in Ameritech Michigan's network and that is not supported by Ameritech Michigan. Mr. Alexander acknowledged that Ameritech Illinois deployed GR303 capable equipment at the request of one of its customers. However, he insisted that the special

circumstances surrounding that situation are clearly distinguishable from MCI's bona fide request. According to Mr. Alexander, the Illinois customer is the manufacturer of the digital loop carrier system and the customer specifically requested Ameritech Illinois to deploy GR303 capable equipment at the customer's premises. Mr. Alexander explained that the single customer application requires special training and manual administration and is unique within the entire region served by Ameritech Corporation.

Mr. Alexander contended that GR303 technology has not evolved to the point that it would be prudent for Ameritech Michigan to generally deploy that technology throughout its network. According to Mr. Alexander, the overall cost/benefit analysis of this technology has not been compelling. Further, he explained that at the time that MCI made its request, Ameritech Michigan's primary supplier of integrated digital loop technology, DCS Communications, did not have a GR303 compliant product generally available. Further, the general deployment of GR303 technology would require significant modifications to Ameritech Michigan's existing hardware and software and to its provisioning and administrative systems. In any event, Mr. Alexander thought it unlikely that Ameritech Michigan would ever deploy GR303 technology in the configuration requested by MCI. According to him, Ameritech Michigan would be more likely to deploy such equipment in the field two to three miles from its central offices. Further, he insisted that there is no reason for Ameritech Michigan to install GR303 capable equipment in its central offices for the exclusive use of another carrier.

Finally, Mr. Alexander insisted that contrary to MCI's contentions, colocation constitutes a viable alternative to MCI's bona fide request. Mr. Alexander testified that collocation would enable MCI to attain the same potential reduction of interoffice transport facilities and switching

equipment that it seeks under the proposed bona fide request. Moreover, Mr. Alexander maintained that any cost savings or efficiencies gained by MCI would be due entirely to the shifting to Ameritech Michigan of the burden of acquiring and deploying GR303 capable equipment.

IV.

PROPOSAL FOR DECISION

The ALJ agreed with MCI that the definition of a network element contained in the interconnection agreement and in the FTA is broad enough to require Ameritech Michigan to provide direct interconnection with all capabilities of an element such as digital loop carrier equipment. The ALJ also found that the record supports MCI's claim that Ameritech Michigan's failure to provide access to digital loop carrier equipment, including all of its capabilities, improperly discriminates against MCI by depriving MCI of the opportunity to configure its network in a way that is functionally similar to Ameritech Michigan's network. Specifically, the ALJ concluded that Ameritech Michigan's refusal to grant MCI's bona fide request deprives MCI of the opportunity to optimize the use of interoffice transport. In making this determination, the ALJ acknowledged that although Ameritech Michigan would have to purchase certain additional software and hardware to make the digital loop carrier GR303 compatibility available to MCI, Ameritech Michigan would be compensated under the terms of the interconnection agreement for such purchases and any other expenses related to required administrative and technical support. Accordingly, the ALJ concluded that Ameritech Michigan must provide MCI with GR303 capability as a feature of a network element regardless of the fact that Ameritech Michigan does not currently use that capability.

The ALJ also found that although in Iowa Utilities Board, supra, the Eighth Circuit Court of Appeals rejected the notion that an incumbent local exchange carrier (ILEC) is required to provide its competitors with superior quality of access or network elements than available to the ILEC, Sections 305(1)(d) and (g) of the MTA lead to a different conclusion. According to the ALJ, Sections 305(1)(d) and (g) of the MTA prohibit Ameritech Michigan from impairing the efficiency of the lines used by other providers and from refusing to meet novel or specialized access requirements. Further, because the Commission ruled in its January 28, 1998 order in Case No. U-11280 that the Eighth Circuit Court of Appeals' decision in Iowa Utilities Board, supra, rejected only the FCC's interpretation of the FTA, the ALJ concluded that the Commission is not foreclosed from regulating access to an ILEC's system pursuant to the MTA in a manner that enhances local competition. Therefore, she found that even if GR303 capability constitutes superior service, due to Sections 305(1)(d) and (g) of the MTA, Ameritech Michigan cannot refuse to provide such capability to MCI.

The ALJ also rejected Ameritech Michigan's argument that it is under no legal obligation to honor MCI's bona fide request because it requires Ameritech Michigan to combine unbundled network elements. Ameritech Michigan's argument was based on the Eighth Circuit Court of Appeals' decision in the Iowa Utilities Board case. However, the ALJ concluded that the Commission has authority under the MTA to define network elements in such a way as to enhance competition. Further, relying on the Commission's orders in Case No. U-11280, the ALJ stated that the Commission has determined that it may require an ILEC to combine elements in certain circumstances so as to promote competition. The ALJ also noted that the interconnection agreement between Ameritech Michigan and MCI contemplates requests for

combinations of elements. Accordingly, the ALJ stated that it would be reasonable to assume that MCI's bona fide request would enhance competition through efficient use of equipment.

Finally, the ALJ noted that the Commission has on two prior occasions determined that collocation was not the only means for a competing carrier to obtain access to unbundled elements. Citing the Commission's October 3, 1995 decision in Case No. U-10647 and its January 28, 1998 decision in Case No. U-11280, the ALJ expressed her belief that the Commission is cognizant of the barriers to competition raised by requiring access through collocation.

V.

DISCUSSION

Oral Argument

Upon filing its exceptions, Ameritech Michigan requests oral argument before the Commission. Rule 339(1) of the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17339(1), gives the Commission discretion to determine whether it will to hear oral argument. In deciding how to exercise this discretion, the Commission must determine whether a full hearing has occurred on the record, as required by the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq. (APA).

The APA requires that parties in a contested case be given an opportunity for a prompt hearing, an opportunity to present oral and written arguments on issues of law and policy, and an opportunity to present evidence and arguments on issues of fact. Further, the APA provides for the right to cross-examine witnesses and to submit rebuttal evidence. However, once the parties have been granted a full and impartial hearing in accordance with the full panoply of

procedural safeguards guaranteed by the APA, a party does not have the right to demand oral argument before the Commission. Rochester Community Schools v State Board of Education, 104 Mich App 569; 305 NW2d 541 (1981).

The Commission finds that the record in this proceeding is sufficient for the Commission to issue an order without oral argument. To grant Ameritech Michigan's request for oral argument when the Commission has before it a full record of evidence, arguments, and exhibits received at the hearing is cumulative and unnecessary.

Bona Fide Request

Citing Section 9.1.3 of its interconnection agreement with MCI,[8] Ameritech Michigan maintains that because it does not deploy GR303 capable equipment anywhere in its network and does not design its network to use digital loop carriers in its central offices, MCI's bona fide request cannot be interpreted to involve a network element that is "available" within the meaning of the interconnection agreement. According to Ameritech Michigan, the word "available" in Section 9.1.3 of the interconnection agreement cannot be construed as meaning "technically feasible." Ameritech Michigan insists that if MCI's argument were accepted, then MCI could demand that Ameritech Michigan provide MCI with any and all technologies that are currently marketed without regard to whether Ameritech Michigan currently uses such technology in its

[8]Section 9.1.3 provides: "Ameritech shall be required to make available Network Elements only where such Network Elements, including facilities and software necessary to provide such Network Elements, are available. If Ameritech Michigan makes available Network Elements that require special construction, [MCImetro] shall pay to Ameritech any applicable special construction charges as determined in accordance with the Act. The Parties shall mutually agree on the nature and manner of any required special construction, the applicable charges thereto and the negotiated interval(s) that will apply to the provisioning of such Network Element(s) in lieu of the standard intervals set forth on **Schedule 9.10**." (Emphasis in original.)

network. Ameritech Michigan insists that, as used in Section 9.1.3 of the interconnection agreement, the word "available" means that the equipment or facilities must already exist in Ameritech Michigan's network. Indeed, Ameritech Michigan states that it cannot be required under Section 9.1.3 to unbundle what does not exist.

Ameritech Michigan also contends that Section 9.3.5.2 of the interconnection agreement[9] relates back to Section 9.1.3 and does not obligate Ameritech Michigan to fulfill a bona fide request for facilities or equipment that it does not already deploy in its network. Further, Ameritech Michigan insists that Section 9.6[10] of the interconnection agreement does not support MCI's position. According to Ameritech Michigan, Section 9.6 only states that a request for a network element combination or standard of quality that was not addressed under the terms of the agreement shall be made pursuant to the bona fide request process. Ameritech Michigan maintains that Section 9.6 agreed to a process, not a substantive right. Moreover, Ameritech Michigan argues that MCI agreed that a service or a network element that is subject to a bona fide request be provided only to the extent that it is "required to be provided by Ameritech pursuant to the Telecommunications Act of 1996 " (See Schedule 2.2, Paragraph 5 of Exhibit R-14.) Therefore, Ameritech Michigan insists that if the right to request a network element or

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[9]Section 9.3.5.2 provides that MCI may request Ameritech Michigan to provide "Unbundled Loop - Concentrators/Multiplexers" as a specific combination of Network Element.

[10]Section 9.6 provides: "Any request by [MCImetro] for access to a Network Element or a Combination or a standard of quality thereof that is not otherwise provided by the terms of this Agreement at the time of such request shall be made pursuant to a Bona Fide Request, as described **Schedule 2.2**, and shall be subject to the payment by [MCImetro] of all applicable costs in accordance with Section 252(d)(1) of the [FTA] to provide such Network Element or Combination or access." (Emphasis in original.)

combination is not found squarely within the interconnection agreement, then MCI has no basis for submitting a bona fide request for such network element or combination.[11]

Ameritech Michigan also asserts that the FTA does not obligate it to reconstruct its network to incorporate the custom design features of its competitors. Citing Sections 153(29) and (45) of the FTA and Paragraphs 249 and 261 of the FCC's First Report and Order, Ameritech Michigan maintains that a network element means a facility or equipment used in the provision of a telecommunication service that is provided by means of such facility or equipment. Accordingly, Ameritech Michigan insists that it has no obligation to offer a network element that it does not already use in its network.

Ameritech Michigan also argues that it is not required to combine existing, distinct unbundled network elements for MCI through use of GR303 capable equipment because these network elements are not currently combined in the manner requested by MCI in Ameritech Michigan's network. Ameritech Michigan asserts that MCI's bona fide request expressly acknowledges that it involves a new combination of network elements and that MCI expects Ameritech Michigan to do all of the work to combine these network elements. However, Ameritech Michigan insists that in the Iowa Utilities Board decision, the Eighth Circuit Court of Appeals recognized that the FTA makes a careful distinction between the provision of unbundled network elements in Section 251(c)(3) and the purchase of an ILEC's telecommunication retail service at wholesale rates pursuant to Section 251(c)(4). According to Ameritech Michigan, in

[11]Ameritech Michigan also contends that it has the right pursuant to Section 29.3 of the interconnection agreement to demand that the agreement be renegotiated to eliminate any provisions that were incorporated by the parties in reliance upon any provision of the [FTA] or the FCC's First Report and Order that was later revised or reversed by a legislative act or a regulatory or judicial decision.

making this distinction, the Eighth Circuit Court of Appeals specifically held that the FTA prohibits competitors from requiring an ILEC to combine network elements.

Ameritech Michigan states that Paragraph 9.3.4 of the interconnection agreement addresses four specific, predefined combinations. Pursuant to Paragraphs 9.3.5 and 9.3.6, all other combinations must be addressed through the bona fide request process. However, Ameritech Michigan stresses that these provisions were included in the interconnection agreement only because of 47 CFR 51.315(c-f), which were vacated by the Eighth Circuit Court of Appeals decision in Iowa Utilities Board, supra. Ameritech Michigan insists that the Eighth Circuit Court of Appeals vacation of 47 CFR 51.315(c-f) is a final and unappealable decision. Therefore, Ameritech Michigan contends that MCI cannot request combination of network elements that are not already combined in Ameritech Michigan's network.

Ameritech Michigan also argues that the Commission's January 28, 1998 order in Case No. U-11280 does not constitute precedent for granting the relief requested in MCI's complaint. Ameritech Michigan argues that Case No. U-11280 involves the question whether MCI could obtain shared or common transport in a combination of network elements or "platform," and did not reach the question of whether Ameritech Michigan could be forced to combine network elements in a manner that does not exist in its network.

Ameritech Michigan also argues that it is not required to provide MCI with superior quality service. In the Iowa Utilities Board decision, the Eighth Circuit Court of Appeals stated that the FTA did not require an ILEC to provide carriers with superior quality interconnection. The court rejected the FCC's requirement of superior service, reasoning that although ILECs may voluntarily agree to provide superior service and be compensated for it, the FTA only mandates

that ILECs provide equal quality service. Because the portion of the Eighth Circuit Court of Appeals opinion regarding the elimination of the FCC's requirement of superior service was not the subject of the writ of *certiorari* issued by the United States Supreme Court, Ameritech Michigan insists that the vacation of 47 CFR 51.315(c-f) is final and nonappealable.

Ameritech Michigan also argues that the MTA only requires it to provide access to the unbundled elements of its existing network. Citing Section 355(1) of the MTA[12], Ameritech Michigan contends that unbundling only applies to its currently existing network and does not create an obligation to acquire novel equipment for the sole use of a competitor. Further, under the MTA, Ameritech Michigan insists that the Commission does not have general discretionary authority to compel Ameritech Michigan to purchase and install equipment in its network. Indeed, Ameritech Michigan stresses that even under the more pervasive rate of return regulation that existed prior to the adoption of the MTA, the Commission lacked authority to order Ameritech Michigan to purchase and install equipment for any purpose.

Ameritech Michigan insists that, contrary to the ALJ's findings, denial of the bona fide request was not an act of discrimination against MCI. According to Ameritech Michigan, MCI can use GR303 equipment the way it wants to through either virtual or physical collocation. Additionally, Ameritech Michigan asserts that MCI misled the Commission in claiming that Ameritech Michigan's network is functionally equivalent to the bona fide request.

Ameritech Michigan also asserts that Section 305 of the MTA, which prohibits discrimination, only precludes Ameritech Michigan from providing inferior service or connection to a

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[12]Section 355(1) provides: "On or before January 1, 1996, a provider of basic local exchange service shall unbundle and separately price each basic local exchange service offered by the provider into the loop and port components and allow other providers to purchase such services on a nondiscriminatory basis."

competitor and cannot be construed to require Ameritech Michigan to provide MCI with superior service. Because Ameritech Michigan does not provision its network through use of GR303 technology, Ameritech Michigan insists that the ALJ wrongly concluded that denial of the bona fide request improperly deprived MCI of the opportunity to configure its network in a way that is functionally equivalent to Ameritech Michigan's network. Ameritech Michigan stresses that MCI is not requesting Ameritech Michigan's technology, which features the use of digital loop carrier systems using Technical Reference (TR) 08 or TR 57 protocols in it's the loop plant. Rather, Ameritech Michigan insists that MCI is demanding something that Ameritech Michigan does not provide to itself or to anyone else. Accordingly, Ameritech Michigan contends that the ALJ's finding of discrimination under Section 305 of the MTA has no factual support.

Ameritech Michigan also maintains that the ALJ improperly concluded that Ameritech Michigan's denial of the bona fide request violates Sections 305(1)(d)[13] and (g)[14] of the MTA. Ameritech Michigan insists that MCI can achieve its objectives through use of virtual collocation. It also maintains that MCI's witness, Mr. Gushue, provided absolutely no testimony regarding the cost, economics, or efficiencies of MCI's request. Given the circumstances, Ameritech Michigan contends that there is no support for a finding that Ameritech Michigan's denial of the bona fide request impaired MCI's access or use of its lines in any way.

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[13]Section 305(1)(d) prohibits a provider of basic local exchange service from impairing the speed, quality, or efficiency of lines used by another provider.

[14]Section 305(1)(g) prohibits a provider of basic local exchange service from refusing or delaying access service or being unreasonable in connecting another provider to the local exchange whose product or service requires novel or specialized access service requirements.